

SECTION

Federal Communications Commission

DA 97-2610

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 97-246
Table of Allotments,) RM-9205
FM Broadcast Stations.)
(Walla Walla, Washington and Hermiston,)
Oregon))

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: December 10, 1997; Released: December 19, 1997

Comment Date: January 9, 1998
Reply Comment Date: January 24, 1998

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making and supplement filed by Mark Jacky Broadcasting ("petitioner"), permittee of Station KUI-FM, Channel 256C3, Walla Walla, Washington, proposing the substitution of Channel 256C2 for Channel 256C3 at Walla Walla, and the modification of Station KUI-FM's construction permit accordingly.¹ To accommodate the upgrade, petitioner also requests the substitution of Channel 258A for Channel 257A at Hermiston, Oregon, and the modification of Station KQFM(FM)'s license accordingly. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration since the substitution of Channel 256C2 at Walla Walla, Washington, would allow Station KUI-FM to expand its service area. An engineering analysis has determined that Channel 256C2 can be substituted at Walla Walla in compliance with the Commission's minimum distance separation requirements without the

¹The supplement to the petition for rule making advised that on October 30, 1996 Station KUI-FM filed a one-step upgrade application (File No. BMPH-961030IE) requesting the substitution of Channel 256C3 for Channel 256A at Walla Walla, which was granted on October 23, 1997.

We note that on November 7, 1997, petitioner filed an application (File No. BAPH-97110GI) for assignment of Station KUI-FM's construction permit from Mark Jacky Broadcasting to Cheryl Hodgins, which is pending.

imposition of a site restriction at petitioner's requested site.² Additionally, Channel 258A can be substituted at Hermiston in compliance with the Commission's minimum distance separation requirements at Station KQFM(FM)'s presently authorized site.³

3. Whenever an existing station is ordered to switch frequency in order to accommodate a new allotment, the Commission requires that the proponent of the new allotment make a commitment to reimburse the affected station for the costs incurred in changing frequency. Accordingly, if the channel substitution at Walla Walla is ultimately adopted, the licensee of Station KQFM(FM) at Hermiston, Oregon, is entitled to reimbursement for the reasonable cost involved in changing its frequency. See Circleville, Ohio, 8 FCC 2d 159 (1967). Therefore, petitioner must state its willingness to reimburse Station KQFM(FM) for costs incurred in changing to Channel 258A. Failure to provide such a commitment could result in a denial of the proposal. See Brookville and Punxsutawney, Pennsylvania, 3 FCC Rcd 5555 (1988).

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Walla Walla, Washington	227C1, 239C, 246C, 256C3, 264C3, 265A	227C1, 239C, 246C, 256C2, 264C3, 265A
Hermiston, Oregon	257A	258A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Westend Radio, L.L.C., licensee of Station KQFM(FM), Hermiston, Oregon, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 258A in lieu of 257A.

6. Pursuant to Section 1.87 of the Commission's Rules, Westend Radio, L.L.C., may, not later than January 9, 1998, file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. The Commission may call on Westend Radio, L.L.C. to furnish additional information. If Westend Radio, L.L.C. raises a

²The coordinates for Channel 256C2 at Walla Walla are North Latitude 45-59-38 and West Longitude 118-10-47.

³The coordinates for Channel 258A at Hermiston are North Latitude 45-51-57 and West Longitude 119-18-45.

Westend Radio, L.L.C. to furnish additional information. If Westend Radio, L.L.C. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Westend Radio, L.L.C. will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

Westend Radio, L.L.C.
2019 Court Avenue
Baker City, Oregon 97814
(Licensee for Station KQFM(FM))

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before January 9, 1998, and reply comments on or before January 24, 1998, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert Lewis Thompson, Esq.
Taylor, Thiemann & Aitken, L.C.
908 King Street, Suite 300
Alexandria, Virginia 22314
(Counsel for Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making and Order to Show Cause and to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making and Order to Show Cause to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed

comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.